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ABSTRACT

Legal issues of minimum competency testing derive from federal and state constitutional, statutory, and regulatory provisions, and from common law. Constitutional provisions for equal protection, due process, and freedom of belief and privacy, are primarily federal; education provisions are state mandated. Only four court cases have directly challenged minimum competency programs: (1) Wells v Banks (Georgia); (2) Hernandez v Board of Education, Lynwood Unified School District, CA; (3) Green v Hunt (North Carolina); and (4) Debra P. v Turlington (Florida). Judge Carr's opinion in Debra P. is thus far the only substantive judicial pronouncement on competency testing. Because of an inadequate implementation period, Florida's right to use the Functional Literacy Examination as a high school graduation requirement is delayed until 1982-83. The court criticized Florida's program but did not order other legal sanctions. Future cases may challenge entire programs or portions, such as: diploma sanctions, remediation, and private school exemption. Other cases may seek to create programs or challenge the use of test results for accountability, malpractice, teacher evaluation, and funding. (CP)

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STATE MINIMUM COMPETENCY TESTING PROGRAMS:

LEGAL IMPLICATIONS OF MINIMUM COMPETENCY TESTING: DEBRA P. AND BEYOND

A Paper Prepared for the

Education Commission of the States

FOR

THE NATIONAL INSTITUTE OF EDUCATION

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During the past ten years accountability has been one of the primary rallying points for education reformers. Accountability can take many forms; one that has achieved special prominence since 1976 is minimum competency testing of pupils. Its origins lie in statewide assessment programs, which were designed to provide an overview of educational achievement for generalized evaluation and planning purposes.[1] The minimum competency testing movement has tended to move in a different direction, however. Most state programs (and 37 states now have programs)[2] have the following elements:

1. They focus on pupil performance in the basic skills;[3]

2. Students are tested at several grade levels against statewide performance standards by means of state-developed instruments;[4]

3. Students who fail to demonstrate adequate achievement are assigned to remedial programs;[5]

4. Increasingly, states are requiring that students by the 11th or 12th grade demonstrate a level of achievement determined to be adequate for high school graduation or for the award of a regular diploma.[6]

These elements make clear that the accountability thrust of the minimum competency testing movement is focused on students. It is they who will be assigned to remedial classes, or denied promotion, graduation or a regular diploma, if they

perform below a specified level. It is they who will bear the stigma of "incompetency" or "functional illiteracy". At this point, in most states the accountability implications of minimum competency testing programs for school professionals and for school systems are informal and indirect.[7]

The potentially serious impact of minimum competency testing programs on students has generated most of the concern about these programs and has led to the few legal challenges thus far directed at such programs. Various legal theories, derived from different constitutional, statutory and common law principles, have been advanced to support these challenges. Most of the theories begin with the alleged injury to students and then assert, in one form or another, a lack of adequate justification for the minimum competency testing programs which caused the injury.

This paper is a follow-up study to a September 1977 paper for the Education Commission of the States entitled, "The Legal Implications of Statewide Pupil Performance Standards". The earlier paper discussed possible legal bases for challenges relating to minimum competency testing. This paper will discuss four actual court challenges[8] and, particularly, Debra P. v. Turlington, a Florida case in which a federal district judge recently rendered the first judicial opinion dealing directly with the legality of a state minimum competency testing program.

The paper will be organized into three major sections. First, there will be a brief overview of the legal theories relevant to minimum competency testing challenges. Second, the four cases will be described and analyzed in terms of the theories advanced, the court's reaction in Debra P., and the meaning and precedential value of that decision. Third, I will make some predictions about legal developments, including efforts to refine and build upon theories already presented to the courts as well as to assert new types of challenges.

An Overview of the Legal Issues

The legal issues relevant to minimum competency testing programs derive from federal and state constitutional, statutory and regulatory provisions, and from common law doctrines. This section of the paper will briefly define each issue, identify the source of relevant law and describe the status of the law prior to Debra P.[9]

1. Constitutional Issues. Competency testing issues can be grouped under at least four kinds of constitutional provisions: (i) equal protection clauses; (ii) due process clauses; (iii) freedom of belief and privacy clauses; and (iv) education clauses. The first three types of provisions are primarily federal;[10] the fourth is exclusively state.[11] There is also a threshold issue rooted in fundamental constitutional concepts

of federalism and separation of powers. That issue is whether substantive challenges to minimum competency testing programs are suitable for judicial consideration at all. In a variety of situations both federal and state courts have deferred to the expertise and authority of school officials, and have refused to become embroiled in detailed educational controversies. The courts could have done that by ruling the issues to be nonjusticiable[12] and by refusing to consider them. That has not generally been the approach taken. Rather, the courts have given education authorities substantial leeway by ruling that their conduct, even if questionable, did not raise questions of constitutional dimension. For example, in Ingraham v. Wright,[13] the United States Supreme Court found that severe corporal punishment inflicted on students without any prior hearing did not raise federal due process issues. According to the Court, the school officials' conduct, if proven to be excessive or unwarranted, could be dealt with through state law remedies.[14] This sort of judicial approach has been taken in cases involving academic evaluation and testing, too.[15] Were this approach adopted in a minimum competency testing challenge, it could result in limited judicial scrutiny of matters such as curricular or instructional validity,[16] the appropriateness and validity of the "passing" score established for the

competency test, and the adequacy of remedial programs provided to students who failed to meet competency standards.

(i) Equal Protection Issues. The Equal Protection Clauses of the Federal Constitution[17] and of many state constitutions[18] bar the state from treating classes of citizens differently unless there is adequate justification for such differential treatment. Certain classifications, such as those based on race and ethnic background, are "suspect" and require the highest order of justification by the state. These concepts underlay many minimum competency testing issues. At least four issues, interrelated in various ways, are rooted in alleged racial discrimination. First, it can be argued that the test instrument itself is racially biased.[19] Second, it can be argued that the minimum competency testing program, in its entirety, is racially discriminatory because a disproportionately large percentage of black students failed to meet the specified competency standards and this disproportionate effect was "intended".[20] Third, if the minimum competency testing challenge is brought in a state with a history of relatively recent educational segregation, especially de jure segregation, it can be asserted that the testing program perpetuates past discrimination.[21] Fourth, racially disproportionate test results, coupled with assignment of "failing" students to separate remedial programs, can support an

argument that the minimum competency testing program is a vehicle for physical segregation, or re-segregation.

Cultural bias in the test instrument may provide students of Hispanic and other ethnic origins with an equal protection-oriented challenge, too. Those students for whom English is not their primary language also may be able to assert, on one of several theories, that the minimum competency testing program denies them equal protection of the laws. If they are required to take an English language minimum competency test and they fail it in disproportionate numbers, they can argue that the state has not adopted a less discriminatory alternative -- a test in their primary language.[22] Conversely, if non-English speaking students are totally excluded from participation in the minimum competency testing program, as they are in many states,[23] they may assert that that exclusion violates equal protection. Their argument would be based on the consequent unavailability of remedial help should they, in fact, have basic skills difficulties beyond their linguistic problems.[24]

Two other classes of students might raise equal protection challenges to minimum competency testing programs. Handicapped students might raise various arguments.[25] For example, if all handicapped students are entirely excluded from the program, they can raise an issue similar to the one referred to above.[26] If

some classes of handicapped students are included and others excluded, the rationality of the state's distinction could be disputed.[27] Should the state follow an approach frequently suggested -- leaving applicability of minimum competency testing requirements to the individualized educational plan ("I.E.P.") process required by federal law[28] -- equal protection issues would be minimized. Challenges, in the first instance at least, likely would proceed through the administrative hearing procedure designed to resolve disputes about the appropriateness of the I.E.P. Of course, as to all these possible challenges the type of diploma awarded handicapped students will be relevant to a determination of the "discrimination" or injury suffered by them.

The final class of students which might claim an equal protection violation is defined geographically. If a state were to adopt a minimum competency testing program which provided substantial local discretion,[29] students in particular districts might challenge the "discriminatory" impact of their districts' policies vis a vis those of other districts. For example, suppose that district A established demanding competency standards and withheld diplomas of students who failed to meet those standards while district B established no competency testing program,[30] district C had a testing program but no diploma sanction, and district D had a testing program and

diploma sanction but much lower competency standards than district A.[31] The effect would be that students in the four districts who performed at identical competency levels would be treated differently. The issue in an equal protection challenge would be whether the state's interest in "local control" would justify such differential treatment.

In general, federal equal protection law has evolved during the past several years in ways which may make it more difficult for challengers of minimum competency testing programs to succeed. That is true at least where the state education system or school district has not previously been guilty of unlawful discrimination. For example, racially disproportionate impact is no longer sufficient to make out a discrimination case. At least since the United States Supreme Court's decision in Washington v. Davis[32] plaintiffs have been required to prove invidious intent.[33] Proof of disproportionate racial impact, although relevant, may be just the starting point for making out a case of purposeful discrimination.

Beginning with its opinion in Village of Arlington Heights v. Metropolitan Housing Development Corp.[34] the Supreme Court has developed a body of case law about how invidious intent could be proven. When the defendants are public agencies and officers there are special proof problems. Several courts of appeals have used the notion of "institutional intent" in dealing with such cases.[35] This involves identifying objective

intent in governmental policy rather than attempting to find more subjective intent in the minds of individual public officials. In U.S. v. Texas Education Agency, the Court of Appeals for the Fifth Circuit found an intent to discriminate based in part upon proof that authorities knew that the "natural and foreseeable" consequences of their acts would be racially disproportionate impact. The Fifth Circuit of Appeals clung to this notion of institutional intent when the Supreme Court required it to review its original finding of intent in light of Washington v. Davis.

In simplified form, this was the state of the law concerning intent when Debra P. went to trial. In a minimum competency testing challenge plaintiffs would tend to rely on "institutional intent" by attempting to prove that school officials knew that the "natural and foreseeable" consequences of the minimum competency testing program would be disproportionate failing scores for Black and Hispanic students. Plaintiffs should be able to do so in many states. The consequences, at a minimum, should be to shift to the defendants the burden of justifying the program. One effort at justification would emphasize the diagnostic and remedial purposes of the program. Defendants would argue that only by such means can the educational opportunities and achievement of minority students be enhanced. This argument would highlight two issues: whether

a diploma sanction is necessary for, or rationally related to, such a purpose; and whether the remedial programs provided students have accomplished or are reasonably designed to accomplish the purpose.

The potential for a successful equal protection claim is greater when minimum competency testing programs are implemented in school systems with a history of racial discrimination. The clearest case is when there has been an adjudication of de jure segregation and court-ordered desegregation.[36] That circumstance is likely to have several consequences. First, courts will be more prone to inquire into and rule upon the details of educational programs. Second, education officials may have a continuing affirmative duty to eliminate the present effects of their past discrimination.[37]

Action which may be racially neutral, nonetheless, can be successfully challenged for its failure "to counteract the continuing effects of past school segregation."[38]

This approach has been used in situations involving testing and assignment of pupils to remedial programs. In a voting rights case,[39] the Supreme Court ruled that the "'impartial' administration of the literacy test today would serve only to perpetuate these inequities [of inferior segregated schools] in a different form."[40] School boards' attempts to thwart desegregation by assigning black students to separate schools or classrooms based on "neutral" mechanisms, such as achievement

tests, have been regularly struck down. In some of the earlier cases, these attempts had the effect of largely recreating or perpetuating all-black schools and the courts had little difficulty dealing with them.[41] More recently, the issue has arisen in the context of classroom assignment.[42] The judicial standard is:

> If it does cause segregation, whether in classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system if the method is not based on the present effect of past discrimination or will remedy such results through better educational opportunities.[43]

As to the role of remedial programs in helping to eradicate the effects of segregation, the Supreme Court noted that "pupil assignment alone does not automatically remedy the impact of . . . unlawful educational isolation; the consequences linger . . . ."[44] School authorities have an affirmative obligation to remedy the educational deficits of unlawful discrimination.

> . . . by the nature of the antecedent violation, which on this record caused significant deficiencies in communication skills, reading and speaking -- the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial program can help dissipate the continuing effects of past misconduct.[44a]

This affirmative obligation, in districts with proven past segregation, requires some means of determining and responding

to student needs. In such districts minimum competency testing programs, if validly developed and administered and if they triggered meaningful remedial programs, would be appropriate -- perhaps even necessary -- responses to the districts' affirmative obligation. Yet critics of these programs have charged that they tend more to perpetuate the effects of past discrimination than to aid in removing the burdens.

(ii) Due Process Issues. Although there may be some overlap between equal protection and due process challenges to minimum competency testing programs, the latter can be asserted by an individual student subject to a program. Membership in a class or group of students, whether identified by race or ethnicity, or otherwise, is unnesscessary. The Due Process clause guards against unjustified deprivation of a citizen's liberty or property.[45] The word "unjustified" is important; just as the Equal Protection clause does not bar all differential treatment of classes of citizens the Due Process clause does not prohibit all deprivations of a citizen's liberty or property. Those deprivations which are rationally related to a legitimate governmental purpose and which afford the affected citizen adequate procedural protections will pass constitutional muster.

In a due process challenge to a minimum competency testing program, establishing the existence of a liberty or property interest -- a necessary first element -- is not likely to pose problems. Issues will arise, however, about the alleged deprivation of that interest in terms both of whether it is rationally related to a legitimate governmental purpose and whether it is carried out in a procedurally fair manner.[46]

Students have a "liberty" interest in being free from stigmatization, which arguably would occur if, through a minimum competency testing program, they were labelled as "incompetent" or "functionally illiterate".[47] Another conceivable liberty interest involves the opportunity to take advantage of the broadest possible range of post-secondary school employment and educational options. Within the scope of property interests are the student's right to an education[48] and to a diploma signifying satisfactory completion of the secondary school program.

Various elements of minimum competency testing programs have been attacked as unjustified deprivations of those interests. First, most of the programs have been criticized for inadequate phase-in periods. The assertion is that before students properly can be exposed to the risk of stigmatization, reduction in post-high school options, assignment to remedial classes, or denial of promotion, graduation or a regular diploma

they must be afforded adequate notice and opportunity to prepare themselves. The following would be the clearest example of a "notice" problem. Suppose that on July 1, 1979 a state legislature enacted a minimum competency testing statute requiring those students who would be in the 12th grade during the 1979-80 school year to take an examination in September 1979. Their failure to demonstrate adequate competence on that examination would prevent them from graduating in June 1980. Those students would have had no effective notice of the new graduation requirement since they would have no significant school time in which to be apprised of the specific competency requirements and in which to prepare themselves.

A related issue is whether the program has what one commentator has called "curricular or instructional validity".[49] That refers to whether the competencies which are expected of the students have been adequately incorporated into the classroom. Arguably it is unfair to test students, and to hinge assignment, promotion, graduation, or the award of a regular diploma, on material not thoroughly covered in school. The problem is likely to be more acute in a minimum competency testing program which emphasizes "life" or "functional" skills than one which focuses on academically-oriented basic skills.

A third due process issue is whether the test instrument itself is valid. The psychometric details of that issue are

beyond the scope of this paper.[50] For present purposes it is sufficient to indicate that validity encompasses a range of matters relating to the identification of the competencies to be tested, their translation into test items, the objectivity (or lack of bias) of the test instrument,[51] the establishment of a "pass" score, the correlation between test results and such factors as the capacity of test takers actually to perform effectively in the "real world",[52] and the consistency of results from one test administration to the next.[53]

The manner in which the test is administered may also raise due process issues. Suppose, for example, that students arguably are tested in an atmosphere, which because of noise or other distractions, makes effective performance difficult. Or suppose that they allege that they were not given the full amount of time. Other due process issues may arise regarding the grading procedures, including the accuracy of computation of their scores. To insure that their test performance actually was below the specified competency level, students may claim a right to copies of correct answers, as well as access to their own answer sheets and to the official calculation of their scores. These sorts of issues suggest that procedural fairness may require the availability of an administrative appeal process.

Two further due process issues could be raised. First,

students could claim an opportunity to retake the test before a serious sanction attaches. Second, more clearly in the realm of substantive due process, students who failed to attain the specified competency level could challenge the entire program on the basis of the inadequacy or non-existence of a remedial response by the school system. They could seek to analogize their situation to that involving the involuntary commitment of persons to mental institutions where inadequate or no treatment was provided.[54]

The likelihood that students would succeed with any of these due process challenges is unclear. In the years following the U. S. Supreme Court's landmark decision in Tinker v. Des Moines Independent School District[55] elementary and secondary school students had considerable success in asserting due process rights in cases involving disciplinary actions.[56] The Ingraham case[57] may have signified a reversal of that trend, however. Moreover, in several relatively recent higher education cases, the federal courts have carefully distinguished academic evaluation actions from disciplinary actions. In the former circumstances, the courts have been even less willing to intervene on the basis of asserted constitutional rights of students. The Court of Appeals for the Fifth Circuit considered a student's challenge to the imposition of a new master's degree requirement -- successful completion of a comprehensive examination.[58]

The Court concluded that the student had a due process interest but that she had been afforded adequate protection in the form of notice of the new requirement and a fair opportunity to avoid the examination requirement by completing additional course work.

More recently, in Board of Curators of University of Missouri v. Horowitz,[59] the Supreme Court dealt with a more complex situation involving "academic" judgments about the student's performance. As the Fifth Circuit had done, the Supreme Court assumed that a student had a due process interest in graduation and a "diploma". But in the Horowitz case, too, the Court ruled that adequate protection had been provided. Throughout the opinion, the Court expressed in various ways its reluctance to second-guess the decisions of professional educators.[60]

Critics of minimum competency testing programs have sought to distinguish the higher education academic evaluation cases on two primary bases. First, they have argued that the compulsory nature of secondary education makes the student's interest in high school graduation and a diploma greater than the constitutional interest of a college or graduate student in his or her degree. Second, they have maintained that the minimum competency testing programs do not involve the same order of academic judgment as the higher education cases (or,

for that matter, as challenges to an individual teacher's grading would even in an elementary or secondary school setting). The standardized nature of the minimum competency tests and the existence of established performance criteria for them reduce the strength of the "judicial deference to professional expertise" rationale in many of the conceivable due process challenges.

The critics' efforts to press these distinctions have been complicated, however, by the Supreme Court's recent decision in United States v. South Carolina.[61] In that case, South Carolina's use of the National Teachers' Examination for employment purposes was upheld largely on the basis of judicial reluctance to interfere in educational matters at the elementary and secondary school levels.[62] The South Carolina case, nonetheless, may be distinguished from a minimum competency testing challenge. The argument would focus upon differences between the state's and test taker's interests in the employment and student evaluation contexts. The state's interest in hiring competent teachers might be considered weightier than its need to certify high school graduates as being minimally competent. Similarly, a prospective teacher has less "right" to a position than a student has to graduation or a regular diploma.

(iii) Freedom of Belief and Privacy Issues. The scope and content of some minimum competency tests may raise significant issues under the First Amendment's right to freedom of expression and belief, and the Fourteenth Amendment's implicit right to privacy. These problems will be minimized if the tests focus on the basic communication and computation skills as they were directly taught in school courses. Rather, the problems develop as the competency tests extend to "functional literacy" -- the application of basic skills to life situations -- and to value-laden subjects beyond the basic skills.[63] There are two areas of concern: (1) if, in order to demonstrate "competency", the student in effect must subscribe to certain values; and (2) if responses to some questions require the student to reveal confidential personal matters.

There are no judicial decisions which provide definitive guidance about how these issues will be resolved in a challenge to a minimum competency testing program. An important line of Supreme Court decisions[64] does protect students from the efforts of school authorities to have them believe in a certain way or to express certain beliefs. The issue is likely to be raised in a less direct and more subtle way in a minimum competency testing challenge. Students will not be pressured to formally and publicly pledge allegiance to a particular

value; instead their "competency" will be assessed on the basis of a test some of whose questions may be premised on a particular value structure. Failure to share that value structure may make it more difficult for the student to satisfy the "competency" standards.

There may be a constitutional difficulty even if the student shares the value structure, however. He or she may be unwilling to disclose that value structure. The fact that the test results are kept confidential makes the argument harder to mount.[65] But, ultimately, it is reduced to the proposition that the state lacks the right to inquire about these matters. Whether that proposition will be sustained by a court depends, to a considerable extent, upon the details of the particular minimum competency testing program. The court will balance the invasion of privacy occasioned by the program against the state's purpose in implementing the program.

(iv) State Education Clauses. In addition to state constitutional counterparts to the federal equal protection, due process, freedom of expression and belief, and privacy clauses, there is another common state constitutional provision which is relevant to minimum competency testing programs. That provision is the education clause.

Every state now has in its constitution a commitment to provide school-age residents with a free public education. About three-quarters of the clauses describe, to some extent, the required education.[66] These clauses may be relevant to, or the basis of, a variety of minimum competency testing challenges.[67] For example, the absence of a minimum competency testing program might provoke a challenge based on the state education clause. The argument could proceed as follows in a state with a "thorough and efficient" clause: the clause obligates the state to provide an educational program designed to equip students to function as citizens and as competitors in the labor market;[68] proficiency in the basic skills is essential for those purposes; establishment of a minimum competency testing program is necessary to ensure that all students have an adequate opportunity to achieve proficiency in the basic skills.[69]

State education clauses may also support challenges to particular minimum competency testing programs. For instance, the level at which competency standards were set could be challenged on the ground that they were not consistent with the state's obligation to provide a "high quality" or "thorough and efficient" education, especially if those education clause requirements had been construed to relate to the students' capacity actually to function in the post-secondary

school world. Challengers might argue that the standards were too low; performance at that level would not permit students in fact to function adequately in higher education, or employment, or as citizens.[70]

Another type of education clause challenge could be brought against a minimum competency testing program which required or permitted different standards to be established in every school district.[71] Some education clauses expressly mandate a "general and uniform" system of education for the state;[72] others have been interpreted to require uniformity across district lines. Arguably, such clauses would be offended by a minimum competency testing program which permitted a student's graduation or diploma to depend upon the district of residence. On the other hand, educational home rule is a well-entrenched tradition in many states, including, paradoxically, some with uniformity clauses.

Finally, a state education clause challenge might be directed at the inadequacies of remedial programs for students who fail to demonstrate their competency. If a state has defined its educational mission to include pupil competency in the basic skills, then it must take reasonable steps to carry out that mission. Effective remedial education, once student deficiencies have been identified, is an essential element.

2. Statutory Issues. Broadly speaking, there are two kinds of minimum competency testing issues which may arise under federal and state statutes (and their implementing regulations). First, statutes dealing either with overall educational matters or with a specific matter other than minimum competency testing may establish legal requirements applicable to such testing. Second, the minimum competency testing statute or regulation undoubtedly will contain a variety of requirements for the implementation of the program.

Challenges can be based on both types of statutes. In the first category, there are statutes which bar racial or ethnic discrimination in education,[73] which provide for certain access to pupil records,[74] which assure citizen participation in education policy-making and governance,[75] and which regulate the education of special groups of students.[76]

Under the second category are statutory requirements such as citizen involvement,[77] standards based upon certain specific inputs,[78] and effective remedial programs.[79]

Statutory challenges to minimum competency testing programs are likely to be narrower and focused on more specific aspects of the program. They will also benefit in many instances from the existence of a statutory or regulatory standard. Thus, courts need not be as concerned in

such cases about the possibility of intruding upon the proper domain of another branch of government.

3. Common Law Issues. The common law, or judge-made law, provides the final basis for a legal challenge relevant to a minimum competency testing program. The challenge is more likely to be to an educational deficiency highlighted by the testing program than to the program itself. Most of the action in this area will involve the competency of the professional staff. The widely-publicized educational malpractice litigation is the most likely vehicle for common law developments. The theory of those cases is that the school system and its professionals owe a legal duty of care to students -- the duty to use reasonably careful and competent efforts to educate; that that duty has been breached; and that the breach has resulted in a legally cognizable injury to the students. None of the educational malpractice cases involving "normal" students[80] has succeeded thus far.[81] Although proving that the traditional malpractice elements are present has posed a problem in these cases, the cases have foundered primarily on public policy shoals. The courts have been unwilling to impose liability on school systems for the failure of their students to learn.

Establishment of a minimum competency testing program may improve the prospects for ultimate success in an

educational malpractice case. It may facilitate proof of the necessary elements, especially a legal duty of care, and allay some of the courts' policy concerns. A minimum competency testing program which required achievement of specified proficiency levels in the basic skills for graduation or a regular diploma must constitute an undertaking by the educational system to educate students to those levels. Implicit in that undertaking must be a belief in the capacity of students to meet the competency standards if they are effectively instructed. Thus, a court could derive support from such a minimum competency testing program for conclusions that: (1) there is a legal duty of care owed by school systems and their professional staffs to students, and (2) imposition of liability, in some form, for breach of that duty is consistent with sound public policy.[82] An educational malpractice suit seeking money damages would still raise substantial policy concerns; one directed at court ordered improvements in the educational program would reduce some of those concerns. However, it would force the court to consider both its capacity to intervene in educational program details and the appropriateness of doing so. Moreover, if the case were styled in the mode of a malpractice case,[83] the student plaintiffs would also have to prove that they suffered a legally cognizable injury as a consequence of the school system's failure. On balance, though, establishment of a minimum competency testing program should strengthen the basis for a common law challenge to inadequate educational programs.

Actual Court Challenges to Minimum Competency Testing Programs

In the seven months between October 1978 and May 1979 four court challenges to minimum competency testing programs were filed. Three were in southern states -- Florida,[84] North Carolina[85] and Georgia[86] -- and the fourth and latest in California.[87] These represent the first direct challenges to such programs.[88] As such, given the rapid adoption of minimum competency testing throughout the country, they will receive great attention. Unfortunately, the quality of the legal preparation in several of the cases is so deficient that the issues and the applicable rules of law may be obfuscated more than clarified.

Thus far, there have been two judicial decisions. One -- Green v. Hunt in North Carolina -- resulted in a summary judgment for the defendants. The federal district court ruled that the plaintiffs lacked standing to bring the challenge because the individual named plaintiff, Bobby Nathanel Green, was not yet subject to the 11th grade examination.[89] Consequently, any harm which might result to him from the test was totally speculative and he lacked the necessary personal stake in the outcome of the litigation to give him standing to sue. This lack of personal stake also meant that Green could not represent the class of students in imminent jeopardy of harm

from the test. Apparently, there are no present plans for further proceedings in this case. This may be just as well from a law reform perspective since the complaint in the Green case was so unartfully drawn that the legal bases for the challenge could not be reliably identified.[90]

The other decision -- by federal district Judge Carr in Debra P. -- dealt in a substantial way with the merits of a challenge which was quite carefully formulated and presented during a four week trial. Judge Carr's opinion will provide a starting point for other courts[91] and deserves close scrutiny. It also considers many of the legal issues identified in the first section of this paper.

The plaintiffs in Debra P. represented three classes of students: (1) "all present and future twelfth grade black public school students in the State of Florida who have failed or who hereafter fail the Florida Functional Literacy Examination" (the "Examination");[92] (2) "all present and future black twelfth grade public school students in Hillsborough County who have failed or who hereafter fail the . . . Examination";[93] and (3) "all present and future twelfth grade public school students in the State of Florida who have failed or who hereafter fail . . . the Examination."[94]

The plaintiffs sought: (1) a declaratory judgment that passage of the Examination as a prerequisite for a regular diploma violates the federal due process and equal protection clauses.

Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974;[95] (2) an injunction permanently restraining the defendants from requiring passage of the Examination as a prerequisite for a regular diploma; and (3) an injunction both to purge their school records of any indication of failure on the Examination and to prohibit utilization of Examination results as a basis for assignment to remedial classes.

To prove that things come in threes,the plaintiffs supported their prayer for relief by advancing three claims (or legal theories). The first claim, on behalf of all the classes of plaintiffs, was that the testing program was racially biased in format and effect, and had not been properly validated,[96] thus violating the equal protection clause and federal civil rights and equal educational opportunity statutes. The second claim, also relevant to all the plaintiff classes, was that the program violated the due process clause by failing to provide adequate notice of,or adequate time to prepare for, the Examination.[97] Finally, on behalf of black plaintiffs, the third claim contended that the Examination was a mechanism for resegregating the Florida schools by means of remedial classes for students who failed the Examination.[98] Allegedly this violates the due process and equal protection clauses, as well as federal statutes.

Judge Carr evaluated these claims and the relief requested in the context of a substantial factual record consisting of testimony and documentation.[99] Following the rule of threes, his conclusions can be divided into the following categories: (1) those respects in which he was persuaded that the Florida Examination program was invalid; (2) those respects in which he considered the program flawed or questionable but not invalid; and (3) those respects in which he found little basis for challenge.

1. Areas of Invalidity. Judge Carr was persuaded that in two respects the Florida functional literacy testing program was legally deficient. First, it perpetuated past racial discimination in the Florida educational system. Second, it failed to provide an adequate phase-in period. His response to both findings was to declare that the Florida statute[100] making the Examination a prerequisite for a regular diploma was, "as applied, in the present context a violation of the equal protection and due process clauses of the Fourteenth Amendment, 42 U.S.C. §2000d, and 20 U.S.C. §1703."[101] Judge Carr also enjoined the state from mandating passage of the Examination as a graduation requirement for four years, until the 1982-83 school year.[102] By that time, "the taint of past segregation and inadequate notice"[103] will have been purged and "the state will be permitted to pursue its educational policies and goals free of intervention."[104]

Understanding why the court was prepared to intervene in the way it did but no further is important to an understanding of Debra P. itself. Beyond that, it is essential to an assessment of Debra P.'s precedential impact on other courts.

As to the racial discrimination issue, the court found indisputable evidence of a long history of discrimination in the Florida schools and consequent unequal educational opportunity. The court took judicial notice of the facts that: (i) Florida schools were de jure segregated from 1885 through 1967; and (ii) black students who attended segregated schools "received an unequal education to that received by white students during those years"[105] because "[b]lack schools during this period were obviously inferior."[106] Moreover, the court was persuaded by plaintiffs' evidence that most black students throughout Florida, and especially in Hillsborough County, remained in segregated, inferior schools between 1967 and 1971, and that this violated their equal protection rights.[107] Since the two classes of black plaintiffs had begun their education in the 1967-68 school year, their early years of schooling were constitutionally flawed. According to Judge Carr, this "constituted a serious impairment to [black] Plaintiffs' ability to learn, especially in the early grades which most educators view as a formative stage in intellectual development."[108] Thus, the results of the Functional Literacy Examination -- a failure

rate among black students approximately 10 times that among white students -- were not surprising. In fact, defendant Ralph Turlington, Florida Commissioner of Education, admitted that a high black failure rate had been anticipated and that "a certain portion of the black failure must be attributed to the inferior education the [black] Plaintiffs . . . received during the dual school period."[109] Based upon the foregoing, the court concluded that "past purposeful discrimination affecting [black] Plaintiffs . . . is perpetuated by the test and the diploma sanction regardless of its neutrality."[110] The practical effect of this conclusion was that a graduation requirement based on a neutral test could not be used until "students regardless of race are permitted to commence and pursue their education in a unitary school system without the taint of the dual system."[111]

Judge Carr's approach to the racial discrimination issues raises several important questions. The first -- whether the graduation requirement was in fact based on a neutral test -- will be considered in the next section of this paper. The second question relates to the court's conclusion that "the taint of the dual system" was eliminated beginning with the 1971-72 school year.

Although the court found that by that time "the actual physical integration of Florida public schools was generally completed",[112] it also found that black children suffered dis-

proportionately during the early years of integration. Among the problems identified were the "significant burden . . . of years of inferior education",[113] the difficulty of adjusting to social, cultural and linguistic differences in the integrated schools, "disparate busing schedules, lingering racial stereotypes, disporportionate terminations of black principals and administrators, and a high incidence of suspensions."[114] Judge Carr found that until at least 1977 the state "did not offer the leadership or the funding to mount a wide-scale attack on the educational deficits created during segregation."[115] Although "meaningful" remedial programs began in 1977, "the vestiges of the inferior elementary education . . . received [by black Plaintiffs] still are present and affect their performance."[116] "[T]he effects of past purposeful segregation have not been erased or overcome."[117]

Despite this impressive litany of deficits continuing to the present, Judge Carr dismissed its relevance to the constitutional questions by an unsupported conclusory statement that they "do not constitute the denial of an equal educational opportunity during this period."[118] Whether or not this conclusion is correct in the abstract, its consequence -- that an "untainted" educational experience began for Florida's black students in 1971 -- seems at variance with the judge's own standard as applied to the facts he found. The practical effect is that

black students who began their educations as early as the 1971-72 school year will be subject to the Functional Literacy Examination as a high school graduation requirement. Even assuming that "meaningful" remedial programs were available to them beginning in 1977, they will have six school years within which to deal with any deficits resulting from a legally "equal" but practically deficient early educational experience. That may be sufficient to justify Judge Carr's result. On the other hand, the logic and factual basis of his opinion would have been strengthened by establishing 1977 as the start of an "untainted" educational experience for black students in Florida.

The other respect in which the court found the Florida examination program constitutional defective is rooted in the due process clause. A violation of that clause requires findings that: (i) plaintiffs have been deprived of a liberty or property right; and (ii) the deprivation is arbitrary or unfair. Judge Carr found that plaintiffs in Debra P. had both liberty and property rights. Their liberty right consisted of "being free of the adverse stigma associated with the certificate of completion."[119] They were deprived of that right by the operation of the Florida functional literacy program because the "stigma which results from the failure of the [Examination] is a very serious problem."[120] According to Judge Carr, plaintiffs "have a property right in

graduation from high school with a standard diploma if they have fulfilled the present requirements for graduation exclusive of the [Examination] requirement . . . ."[121] Plaintiffs were deprived of that property right by the state's redefinition of the requirements to include passage of the Functional Literacy Examination.

The court concluded that the deprivation of these rights was arbitrary or unfair, and therefore a violation of the due process clause, because plaintiffs had inadequate notice of the new requirements imposed by the Examination and inadequate time to prepare to meet them.[122] The functional literacy objectives, on which the test items were based, had been distributed during the summer of 1977 -- only four months prior to the first administration of the Examination. In fact, the court found that there had been only two months of instructional time available for preparation. There were only 13 instructional months available between December 1977, when the first results were released, and the third administration of the Examination in April 1979. Even within that period the court found that effective remedial programs were available for only slightly more than half the time -- from Spring 1978. The problem would have been less serious had the Florida educational system been providing students with instruction reasonably related to the functional literacy objectives. The court found that not to be

the case. Prior to 1977, there was great diversity of instruction among the 67 county school districts. "Even now . . . no one text contains all of the functional literacy objectives."[123] ". . . [T]hroughout the period of the Plaintiffs' education, the individual counties remained the single most important entities for the design and implementation of instructional programs and the selection of textbooks."[124] This lack of statewide instructional uniformity was not the only problem, however; the court perceived "a much larger issue."[125] "The principal problem with the instant program is that the instruction in previous years took place in an atmosphere without the specific objectives now present and without the diploma sanction."[126] The consequence of this is that "[t]he implementation schedule in effect relative to the functional literacy testing program with the diploma sanction is fundamentally unfair."[127] Thus, the due process clause was violated.

In determining its response to this violation, the court relied upon expert testimony indicating that "four to six years should intervene between the announcement of the objectives and the implementation of the diploma sanction."[128] This testimony permitted the court to intervene in a relatively modest way to cure the constitutional deficiency. Having already concluded that the diploma sanction could not be applied to black students until the 1982-83 school year, the court expanded

the same deferral requirement to all students. Arguably, this will provide five years' notice of the test's instructional objectives before the diploma santion becomes effective.

The plaintiffs had sought more extensive judicial intervention -- invalidation of the diploma sanction as "a punitive measure which is excessive and not the least restrictive manner in which to achieve the goals identified by the state."[129] The defendants had responded by asserting that the diploma sanction was essential to the entire minimum competency program. The court noted, in considerable detail, the problems created by the diploma sanction. In particular, Judge Carr likened its application under the facts before him as "analogous to asserting that the immediate and indefinite incarceration without a trial of an individual upon the suspicion of the commission of a crime would have a deterrent effect on other potential offenders."[130] Even assuming that that would be the result, the court found it a clear violation of the due process clause. Moreover, Judge Carr noted that "[t]he Defendants had other constitutionally acceptable alternatives such as phased introduction of the objectives in all grades without the diploma sanction. . . ."[131] But, despite these findings, Judge Carr was unwilling to go beyond ordering the four year delay in implementation of the diploma sanction. In the final

analysis, his justification was based upon judicial deference to the views and prerogatives of the Legislature and the State's education authorities.

2. Flawed But Not Invalid Aspects of the Program. To further justify his relatively narrow invalidation of the Florida program, Judge Carr had to dispose of three other challenges which posed significant difficulties. They involved: (i) the racial impact of the test, independent of past de jure discrimination; (ii) the invalidity of the test; and (iii) the inadequacy of the instructional program.

(i) Racial Impact. A state's actions may, of course, violate equal protection because they are racially discriminatory without regard to any past discrimination. Since the United States Supreme Court's decision in Washington v. Davis[132] plaintiffs have had to prove that the state's actions were prompted by invidious intent as well as that they had a racially disproportionate impact. Invidious intent can be proved circumstantially and that is what plaintiffs sought to do in Debra P.[133] They introduced evidence showing that the far higher black failure rate on the Examination had been foreseen by the state's education authorities. One judicially accepted standard of intent -- the "objective standard" -- has been that "official decision makers would be held to have intended the reasonably foreseeable consequences of their decisions."[134]

Under that standard, the evidence in Debra P. could have led Judge Carr to conclude that plaintiffs had proved present discriminatory intent. But the court derived and applied a different and more demanding standard from a very recent U.S. Supreme Court decision.[135] According to the Supreme Court:

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. [Citation omitted] It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group.[136]

Although foreseeability of a consequence is still relevant under that standard, it is not dispositive. The inference of discriminatory intent which can be drawn from the clearly adverse consequences of particular decisions can be dispelled by evidence of other legitimate state interests. That is precisely what Judge Carr found in Debra P. The clear racially adverse consequences of the Functional Literacy Examination and diploma sanction had to be balanced against the state's "legitimate interest in implementing a test to evaluate the established state-wide objectives" and "to identify deficiencies for the purpose of remediation."[137]

The court concluded that:

> The legitimate interests in the test program are substantial, but the timing of the program must be questioned to some extent because it sacrifices through the diploma sanction a large percentage

> of black twelfth grade students in the rush to implement the legislative mandate. While the state Defendants have demonstrated a disregard of the reasons for the disproportionate black failure (i.e., the inferior education received during segregation and the dearth of interim remediation), the Court has not been presented with sufficient proof that the motivation for implementing the program was in Feeney terms "because of" the large black failure statistics.[138] (Emphasis added.

So, once again, Judge Carr was critical of the state's program but unwilling to order legal sanctions. He had found that the state education authorities: (i) clearly had foreseen the racially disproportionate impact of the program; (ii) had recognized that the disproportion was attributable in substantial part to educational inequalities relating to de jure segregation; (iii) had demonstrated a "disregard" for this state-created problem by a "dearth of interim remediation";[139] and (iv) had "sacrificed" a "large percentage of black twelfth grade students in the rush to implement the legislative mandate"[141] despite the availability of less onerous alternatives.[141] Yet, on the basis of a narrow reading of a Supreme Court decision, which may not even be controlling because of sharp factual differences, Judge Carr bowed to the state's basic approach.

(ii) Test Validity. The matter of test validity raises due process and equal protection issues. Under the due process clause, the standard is whether the test is an arbitrary and unreasonable means of depriving plaintiffs of a liberty or

property right. Under the equal protection clause, the standard is whether the test classifies plaintiffs -- into "passers" and "failures" -- without a rational relationship to the purpose for which it was designed. Complex questions of fact and law are involved, but Judge Carr's opinion deals with them in a relatively superficial manner. Again, he finds substantial flaws in the defendant's conduct but concludes that they do not rise to constitutional dimensions.

For example, Judge Carr is critical of the use of the term "functional literacy" in connection with the Florida examination.[142] His problems are two-fold: there is no common understanding among academicians or the public about what "functional literacy" means; it is clear that the term "functional illiterate" has a "universally negative influence".[143] According to Judge Carr, "The categorizing of an individual without reference to a specific standard can be both detrimental and debilitating without justification".[144]

The problems growing out of use of this terminology are relevant to the legal validity of the instrument. One approach to whether the Florida examination is a valid and reasonable measure for classifying students in terms of high school graduation is its content validity.

> To demonstrate the content validity of a set of test scores, one must show that the behaviors demonstrated in testing constitute a representative sample of behaviors to be exhibited in a desired performance domain.[145]

Plaintiffs had argued in Debra P. that the Florida test lacked content validity. Their theory in effect was that the "behaviors demonstrated in testing" did not adequately represent the "desired performance domain" because that domain, by legislative directive, was "functional literacy" whereas the Florida test did not match any definition of functional literacy. Judge Carr agreed that "the domain of the Florida test does not equate with every definition of functional literacy or for that matter with many definitions . . . ."[146] In fact, the only definition the court indicated that it matched was the one given by the Florida state education authorities in the form of the statewide objectives. As to whether those objectives constituted an acceptable definition of functional literacy, the court merely said that the Florida legislature apparently "is satisfied with the manner in which the State Board of Education has fulfilled its mandate."[147] Once it made that leap of faith -- analyzing the test "from the perspective of its objectives and the definitions by its designers" rather than by focusing on its legislative origin, its title, or public or academic understanding of "functional literacy" -- it was a simple matter for the court to conclude that the objectives were "adequately evaluated by the test items and that the test has content validity."[147a]

The court dealt similarly with construct validity.[148]

It concluded that the Florida test had adequate construct validity (without deciding whether the test was legally required to satisfy that standard).[149] The construct, according to Judge Carr, was the state's definition of "functional literacy", whatever that definition's relationship, if any, to other hypotheses about functional literacy. The court gave no guidance as to why or how the construct, so defined, predicted behavior.

The court also brushed aside a host of other flaws in test development and in the instrument itself[150] as "without constitutional merit."[151] Although the court found that some of the flaws "were indeed errors of considerable magnitude", they were not deemed to "cross . . . the line between inadequacy and constitutional infirmity."[152] In other words, even substantial departures from the "state of the art" in educational measurement and testing do not violate the due process or equal protection clauses.

Finally, the court rejected the plaintiffs' argument that test items were racially or ethnically biased. It recognized that "some of the questions do seem to have factual settings unfamiliar to certain racial groups",[153] but it concluded that "the distraction is minimal and unpersuasive."[154]

Thus, a test concededly flawed in many respects was held to bear a rational relationship to a valid state interest and to be constitutional.

(iii) Instructional Inadequacy. Plaintiffs alleged that there were defects in the curricular and instructional response to student failure on the functional literacy examination.[155] Defendants responded by emphasizing that an increasing percentage of black students had passed the examination since its first administration. Early in his opinion, Judge Carr stated that "remediation is now underway in a meaningful sense"[156] and that "the increased passing rate is impressive."[157] But subsequently he referred to "remediation classes .. attempting to teach the skills."[158] Even more pointedly, the judge said:

> The effectiveness of the remediation programs is somewhat in doubt at the present time because of the failure of the state defendants to carry out equating studies. These studies would have shown the relative degree of the difficulty among the three administrations of the functional literacy test. Based on the present evidence it is impossible to determine whether the tests are becoming easier or whether the remediation program is accomplishing its goal. In either event, large numbers of students have not passed the functional literacy test.[159]

The questionable efficacy of the remedial programs contributed to Judge Carr's conclusion that the diploma sanction must be deferred until all students had spent their entire educational careers in a de jure integrated system. But he was unwilling to attach broader consequences to the belated and questionable remedial programs.

3. Challenges with Little Basis. The final leg of Judge Carr's triad was his disposition of two challenges to the Florida program which he concluded had little basis. These involved: (i) the resegregation caused by the compensatory education program; and (ii) the racial discrimination implicit in the exemption of private school students from the functional literacy program.

(i) Resegregation in the Compensatory Education Program. The compensatory education program for students who had failed the Functional Literacy Examination "is disproportionately composed of black children"[160] and, therefore, causes "resegregation of certain classrooms."[161] But the court concluded that the program was constitutionally justified because it "will remedy the present effects of past discrimination through better educational opportunities."[162] It based its conclusion upon the following factors: "pupil alignment in the compensatory education programs is not static";[163] it "constitutes only at most two classes or hours per day"[164] and students spend the rest of the school day in regular classes; "[t]hus far the record is clear that the purpose of the compensatory education program is to assist students and not to resegregate them."[165]

(ii) Exemption of Private School Students. Plaintiffs launched a double-barrelled challenge to the exemption

of private school students from the Functional Literacy Examination: that it created a racial classification because 95% of private school students are white; and that it was arbitrary because "the state has an interest in assuming that all of its students, not just public school students, receive instruction in basic practical application skills."[156]

The court disposed of this argument by detailing the minimal regulation of private schools by the state of Florida. "The State of Florida does not regulate any substantive matter affecting education in private schools."[167] Consequently, even though the court recognized that a private school diploma meets the state's criterion for jobs requiring a diploma and for admission to a state university, it concluded that the decision to apply the Functional Literacy Examination "only to public schools over which the state already had significant curricular, instructional, and financial control was both reasonable and constitutional."[168]

Despite the federal district court's relatively limited intervention in Florida's functional literacy program -- a four year delay in the state's right to use the Examination as a prerequisite to high school graduation -- the state has appealed to the Fifth Circuit Court of Appeals (and the plaintiffs have cross-appealed from the district

court's rejection of other aspects of their challenge]. The resolution of the appeals will take years, perhaps even longer than the four year delay ordered, and the district court's order has not been stayed pending appeal. Nonetheless, the state is pressing the appeal to resolve legal issues which it believes raise "several very serious concerns."[169] Meanwhile, the test will be used as a "valid diagnostic measure of minimum skills that every high school student receiving a high school diploma should obtain."[170]

The precedential impact of Debra P. on other court challenges will be limited somewhat by the pending appeal. But for the foreseeable future it will be the only substantive judicial pronouncement in this area. As such, it will certainly receive careful consideration by other courts. This will be true even though the two other pending cases are structured in significantly different ways.

The next court challenge likely to result in a decision is the Georgia case of Wells v. Banks,[171] another federal district court proceeding. That case seeks to raise some of the same issues as Debra P., but in a different context. Georgia has not yet established a formal statewide minimum competency program.[172] The

challenges in the Wells case were directed at the Tatnall County school system's use of the California Achievement Test as a high school graduation requirement. Challenges paralleling Debra P. were aimed at inadequate notice and phase-in time, and racial discrimination. The plaintiffs, students and their parents in the Tatnall County schools, also argued that: (i) the county superintendent had implemented the test and graduation requirement arbitrarily and without adequate approval of the county and state boards of education; (ii) the application of this requirement to Tatnall County students denied them equal protection since no other students in the State of Georgia were subject to a comparable requirement; and (iii) the county board of education's composition was constitutionally and statutorily defective due to malapportionment.

The Wells case is scheduled to be heard by the federal district court in November despite a number of difficulties growing out of the nature of the proceeding[173] and the deficiencies in the legal presentation on behalf of plaintiffs.[174] But it is not entirely clear from the paper record what issues the court will focus on.

Debra P. will be relevant[175] and should be helpful to plaintiffs in several respects. First, it demonstrates that a diploma sanction causes substantial harm to affected

students. Second, it reinforces plaintiffs' arguments on the due process notice and phase-in issues. Judge Carr found, on the basis of expert testimony, that a four to six year phase-in period was required. He also ruled that the instructional program had to emphasize the objectives tested. The Tatnall County program appears to be clearly vulnerable on the first basis -- according to the State Board of Education decision in the case the graduation requirement was applied in 1978, two years after the policy was adopted. It is not clear from the record whether the Tatnall County program is also vulnerable on instructional grounds but it may well be. Apparently, the California Achievement Test was selected as the evaluation instrument subsequent to the May 1976 adoption of the graduation requirement policy. Defendants successfully asserted in the administrative proceedings that failing students had various remedial opportunities available to them, could participate in graduation exercises and receive a certificate of attendance without passing the California Achievement Test, and could subsequently earn a diploma by passing the GED examination. None of these assertions would appear to meet Judge Carr's concerns, however.

Finally, whether or not Debra P. will be helpful to plaintiffs on the racial discrimination count depends upon

the evidence regarding past de jure segregation in Tatnall County. If the schools there were physically integrated after the present 12th grade students entered the public schools, then Debra P. will provide strong support for at least some deferral of the diploma sanction. If, on the other hand, the schools were physically integrated prior to that time, Debra P. will support the defendants (unless the Wells plaintiffs can make a stronger showing than the Debra P. plaintiffs of present discriminatory intent).

On other issues not directly raised by the Wells plaintiffs, such as test validity or the adequacy and impact of remedial programs, Debra P. would appear to help defendants more than plaintiffs. The Wells' issues as to which Debra P. provides no guidance -- the lack of adequate administrative approval and denial of equal protection based on geographic factors -- do not provide a strong basis, especially in a federal court, for a ruling in plaintiffs' favor. Thus, the decision in Wells is most likely to turn on the same due process and racial discrimination issues that occupied Judge Carr's primary attention in Debra P. Unless the quality of representation in Wells improves sharply during the trial, plaintiffs will have difficulty faring even as well as the Debra P. plaintiffs.

The final pending case, Hernandez v. Board of Education, Lynwood Unified School District,[176] is a fundamentally different type of challenge. It is based not on constitutional claims but on the alleged failure of the Lynwood School District to implement the California basic skills proficiency program in conformity with the governing statute. The challenge has been filed in a state court, the Superior Court in Los Angeles County.

In 1977, the California Legislature adopted a statute under which governing boards of all school districts were required to adopt standards of proficiency in the basic skills -- reading comprehension, writing and computation.[177] The purpose of this program was to provide a basis for grade promotion and remediation decisions beginning in the elementary grades. According to the statute, "the standards of proficiency shall be adopted by the governing board with the active involvement of parents broadly reflective of the socioeconomic composition of the district, administrators, teachers, counselors, and with respect to standards in secondary schools, pupils."[178] (Emphasis added.)

The main thrust of the plaintiffs'[179] challenge was that the Lynwood Board of Education had adopted recommendations for implementing a proficiency program without obtaining the active involvement of parents, teachers and pupils. Thus, plaintiffs allege that the proficiency program is

unlawful, funds should not be expended on it, and the court should grant a temporary restraining order, preliminary injunction and permanent injunction. To support their argument for preliminary relief, the plaintiffs argue that students will be irreparably harmed if the program is permitted to continue pending a decision about its legality because they will be detained or promoted, and graduated or kept from graduating, based upon its results.[180]

Debra P.'s relevance to the Hernandez case obviously is limited. But it should at least strengthen plaintiffs' claim for preliminary relief by helping to demonstrate the harm caused by retention in grade or, especially, by denial of graduation. Beyond that it may argue for a longer phase-in period, especially for non-English speaking students.

Predicting Legal Developments

The Debra P. case dealt with many of the federal equal protection and due process issues relevant to minimum competency testing programs. The Wells case may provide some further guidance (or at least another court's views) about the matters. It should also treat the legal implications of a lack of statewide uniformity in applying competency standards and a diploma sanction. The Hernandez case will treat another issue -- the effect of an alleged failure to comply with the procedures specified by the governing statute -- against a back-

drop of dissatisfaction with the way the program deals with bilingual students.

Even after decisions in Wells and Hernandez have been added to Judge Carr's opinion in Debra P., however, the law in this area will only be in its early formative stages. Further litigation will be necessary to clarify uncertainties in those early decisions, or to reflect dissatisfaction and disagreement with them, or to extend the law relating to minimum competency testing programs into new areas.

These legal developments are likely to fall into four categories: (i) cases seeking to invalidate or defer effectiveness of the entire program; (ii) cases attempting to invalidate or defer effectiveness of portions of the program; (iii) litigation efforts to require the creation of minimum competency testing programs where none exist; and (iv) cases in which the use of minimum competency test results for other purposes is asserted or challenged. This concluding section of the paper will consider briefly specific legal issues likely to arise in each of these categories.

1. Attempts to Invalidate or Defer Effectiveness of the Entire Program. Ironically, the most feasible way to attempt to invalidate an entire minimum competency testing program is by asserting one of the most limited legal theories. In both Wells and Hernandez the plaintiffs sought invalidation

was "intended" to discriminate or perpetuated the effects of past discrimination. Defendants' counter-argument -- that it is actually a mechanism for improving educational opportunities of minority students -- is a powerful one (at least if there is credible evidence that that is an aim of the state). This is not to suggest that a court would sustain every element of the program on that basis; it is to suggest the difficulty of invalidating the entire program.

The lack of curricular and instructional validity, although it received rather short shrift in Debra P., actually may have more potential.[184] This is true even though the court would be entering more directly into the educational program terrain. Plaintiffs would have to prove that there was a gross mismatch between actual classroom instruction and the subject matter covered by the minimum competency test. Of course, this may be a formidable task. The more clearly the test is focused on "life" skills, as opposed to academically-oriented basic skills, the more conceivable it is that plaintiffs could succeed. In fact, Judge Carr's treatment of "functional literacy" in Debra P. was one of the weakest portions of his opinion. Plaintiffs would also be aided substantially by evidence that the state had not even seriously addressed the instructional implications of a minimum competency testing program.

Finally, plaintiffs might attempt to invalidate an entire minimum competency testing program, which was premised on

local district discretion, on the basis of its lack of geographic or territorial uniformity. Courts generally have not been responsive to such uniformity arguments in other types of cases.[185] However, the challenger's prospects would be improved if the particular minimum competency testing program imposed a direct and substantial sanction on "incompetent" students (e.g., denial of graduation or a regular diploma), the standards used by various districts differed dramatically from one another,[186] and the state's constitution clearly established an educational uniformity requirement.[187]

2. Attempts to Invalidate or Defer Effectiveness of Portions of the Program. The Debra P. order provided for deferral of the diploma sanction. Otherwise, the court permitted the Florida program to continue in effect. Plaintiffs had argued in that case, among other things, that the diploma sanction should be invalidated because of the substantial harm it caused without adequate educational or other justification. The court stopped just short of accepting that argument. Ultimately, Judge Carr seemed to fall back upon deference to the educational experts, who had asserted that the diploma sanction was essential to the entire program.

The obvious closeness of the question in Judge Carr's mind, and the general consensus among minimum competency testing critics that the diploma sanction is the most objectionable feature of such programs, will result in future challenges

directed at invalidation of that aspect. Based upon Judge Carr's factual findings in Debra P., it appears that plaintiffs presented the evidence on this point effectively. No glaring inadequacies are apparent from the record. Future litigants will have to continue stressing that the demonstrable harm to students from the diploma sanction far outweighs any educational or administrative justification for it. As judges become more accustomed to addressing this question and as the evidence of concrete harm grows, they may simply overcome their reluctance to intervene in "educational" judgments.

Similar efforts will be directed at invalidating other aspects of minimum competency testing programs.[188] Plaintiffs in Debra P. challenged three other aspects of the Florida program: (i) the validity and objectivity of the test instrument; (ii) the remedial classes to which "failing" students were assigned; and (iii) the exemption of private school students from the minimum competency requirement. None of these challenges were successful but substantial questions were raised, especially about the first two.

The Florida Functional Literacy Examination, despite its conceded limitations and imperfections, exhibited some of the attributes of a conscientiously and professionally developed instrument. The responsible state education officials apparently were able to make a credible showing to that effect at the Debra P.

trial. As a consequence, a judge predisposed to give deference to state officials' exercise of discretion was able to justify a decision in their favor on that point. Plaintiffs' success or failure in future cases will depend on whether the state can make at least as effective a showing as did the Florida defendants. Of course, if the evidence reveals that the state used an instrument which clearly was unsuited to the purpose, had been carelessly developed, had an arbitrary passing standard, or contained biased items, a court should invalidate its use. In other, less egregious circumstances, the plaintiffs' burden of persuasion will continue to be difficult to satisfy. An argument that the test should be invalidated because it contained material which invaded the students' rights to privacy or freedom of belief can draw upon some judicial support. However, here, too, the plaintiffs' proof problems will be considerable.

The Debra P. plaintiffs sought to invalidate assignment of pupils to remedial programs based on their Examination performance. The problems allegedly were three-fold: assignment could not be premised on an invalid test; the remedial classes resegregated students and stigmatized them; and the classes did not in fact enhance the educational opportunities afforded those students. Judge Carr found that the evidence refuted the plaintiffs' first assertion (in the sense that the test

was "neutral"), supported their second assertion, and was inconclusive about the third. However, the possibility that the remedial classes were improving the students' educational opportunities was sufficient to overcome the racially segregative and stigmatizing consequences. The message for future litigants is clear: to prevail on this issue plaintiffs must be able to demonstrate that the basis of assignment is not "neutral", or the remedial classes are not upgrading the students' educational opportunities or performance to any significant degree, or both. As a practical matter, if plaintiffs can persuade a court to invalidate the remedial response to student "incompetency", the entire program may be undermined. If the program stigmatized students and injured them by imposing other sanctions without incorporating an educationally appropriate response to the problems identified, it could be attacked as arbitrary under substantive due process notions. On the other hand, invalidating separate remedial classes does not foreclose other educational responses, such as providing remedial help within the regular classroom or restructuring the entire instructional program to deal more effectively with skills covered by the minimum competency test.[189]

Finally, the Debra P. plaintiffs attacked the exemption of private school students from the test requirement. The court rejected this argument, finding it not to raise a substantial

question. Judge Carr's reasoning focused on the historic freedom of Florida private schools from state regulation of their educational programs. He also stressed the constitutional propriety of a state responding to an educational problem in a sequential manner rather than being compelled to deal simultaneously with all aspects of the problem. Plaintiffs in future cases may broaden the challenge to a minimum competency testing program's coverage. Although Debra P. may have some precedential weight as to private school exemption in other states with limited private school regulation, in states which do regulate the educational programs of private schools to any substantial degree the argument may still be viable.[190] Moreover, equal protection or due process challenges to the exclusion of "special need" public school students, such as the handicapped or bilingual, may not be influenced at all by the Debra P. decision. The litigants in such cases will do battle largely on issues of fact. Initially, the courts' tendency to defer to the judgments of the official education authorities may tilt the decisions toward the defendants; thereafter, however, if a clearer consensus develops in the education community about the best way to treat these special need students, states whose minimum competency testing programs are at variance with that consensus will find it harder to defend their student coverage decisions.

Several other conceivable challenges to elements of

minimum competency testing programs were not raised in Debra P. but might be in future litigation. First, the procedural protections afforded students might be attacked as inadequate to assure procedural due process. For example, the absence of adequate procedures to verify that a student's score on the test had been accurately determined and recorded, or that the circumstances surrounding the taking of the test were appropriate, would raise substantial due process questions. Indeed, the absence of a clear and well-publicized appeal process for the resolution of all sorts of issues could be challenged. The court's judgment of how much process was due ultimately would turn upon a balancing of the importance of the students' interests against the administrative and other burdens stemming from the procedural protections. Judge Carr's factual conclusions in Debra P. indicate that courts in future cases are likely to treat the student interests as weighty. To succeed in the challenge, plaintiffs would have to demonstrate that the proposed due process procedures would not be excessively onerous for school authorities.

A whole range of other challenges to aspects of a state's minimum competency testing program could be based on statutory and regulatory provisions. Of course, federal statutes and implementing regulations applicable to a particular state would prevail over any inconsistent elements of a state's minimum

competency legislation or of its actual program. Thus, the state's program would have to be compatible with federal statutes requiring such things as parental involvement, confidentiality of pupil records, appropriate educational opportunities for the handicapped, and non-discrimination on the basis of race, ethnic origin, gender or linguistic background. Implementation of the program could also be challenged based on the state's own statutes and regulations, including those that establish the minimum competency testing program. For example, if the statute required "appropriate" or "effective" remedial programs for students who failed the test, plaintiffs could assert that the programs actually available were manifestly "inappropriate" or "ineffective". Although this issue requires a court to get involved in educational program matters, some courts have not shied away from the challenge.[191]

A final type of partial challenge to a minimum competency testing program raises some of the most interesting and far-reaching possibilities. In Debra P. Judge Carr deferred application of the diploma sanction to black students for four years because the early years of their public education had been spent in a system which was constitutionally defective and educationally inferior. The nexus between unconstitutionality leading to educational disadvantage, on the one hand, and the inherent unfairness of holding students disadvantaged in such a way to the

same standard as other students, on the other, is not unique to racial discrimination cases. Racial discrimination generally may have a special place in the pantheon of constitutional rights but in this area other forms of unlawfully created disadvantages may provide as compelling an argument for deferral of a minimum competency testing program's sanctions. To illustrate, since 1971 students of a substantial number of states have been found by courts to have received unequal and inferior educational opportunities as a result of constitutional deficiencies in their states' school finance laws.[192] In most of the states, the defects have not yet been fully cured.[193] Even in states which purport to have fully responded, the purging of the unconstitutional disadvantage is very recent. The educational deficits resulting from inadequate funding would seem comparable to those stemming from racial discrimination,[194] or at least substantial enough to justify judicial relief. By Judge Carr's reasoning, students in those states, who began their educations prior to the "purge" should not be subject to a diploma or other substantial sanction. The full minimum competency testing program, including whatever sanction it contains, should not apply to all students until they have had a fully constitutional educational program throughout their entire careers in the public schools.

The analogy between racial segregation and school finance

inadequacies is the most obvious one presently available. Both involve past adjudications of statewide constitutional violations. Both involve remedial processes which are complex, far-reaching and time-consuming. Both affect, in undesirable ways, the quality of the educational opportunity provided students. It is conceivable, though, that other educational defects will be identified through litigation,[195] which will extend the analogy. For example, suppose that a successful challenge were brought to the adequacy of teacher certification statutes and procedures.[196] The ultimate thrust of that challenge would be that students had been denied competent instruction. A proven lack of competent instruction, in at least some schools or districts, could well support the conclusion that the students involved should not be held to the same achievement standard as students who had received competent instruction throughout their educational careers.[197]

3. Attempts to Require Creation of a Minimum Competency Testing Program. An important thrust of the plaintiffs' challenge in Debra P. was to the very existence of a minimum competency testing program, at least if it contained substantial sanctions against students. The success of the plaintiffs in obtaining some strong, favorable findings of fact by Judge Carr, even though they did not result in substantial invalidation of the program, may deter other states from pursuing minimum competency testing initiatives. As indicated previously,[198]

however, states may not be free to abandon entirely such efforts. Students, parents, taxpayers, employers, institutions of higher education and others, each from their own perspectives, may seek to require the state to develop and implement a minimum competency program. To a considerable extent, their interests will coincide; they will attempt to make the public education system more accountable for pupil performance. This is likely to translate into a program with diagnostic and remedial aspects. Beyond that point, however, the interests of these groups may diverge. Students and parents, for example, may oppose the imposition of strong sanctions against students, such as denial of promotion, a regular diploma or graduation. Taxpayers, potential employers and institutions of higher education, on the other hand, may favor such sanctions on the ground that a high school diploma should have a concrete, relatively uniform (at last as a minimum) meaning. This sort of coalition has found sufficient common cause in some states to force reluctant state education authorities to adopt statewide minimum competency testing programs.[199] Thus far, no judicial efforts have been launched for this purpose.

The other circumstance in which judicial intervention might be sought to require creation of a minimum competency testing program is where a state has taken a local option approach toward such programs. This paper previously addressed

the question of whether students and their parents could invoke uniformity notions to challenge the selective imposition of minimum competency standards upon them.[200] The other side of the lack-of-uniformity coin involves an assertion that equal protection doctrine requires that, if some students are subjected to the requirement by action of the state or its agents, all students should be subjected to it. This assertion would be strengthened by characterizing the program as a benefit not a detriment.

4. Attempts to Use Minimum Competency Test Results for Other Purposes. The first two categories of future challenges discussed in this paper are based on total or partial defects allegedly characteristic of minimum competency testing programs. The third category -- shifting the perspective -- is based upon the presumed validity of such programs, at least if they are structured in particular ways, and seeks to require their creation. The final category also presupposes that the programs, and especially the test results generated by them, are valid. In litigation falling within this fourth category, those test results would be used in a variety of lawsuits seeking to impose, or support the imposition of, "accountability" on school systems. Among a considerable array of possibilities, the following types of challenges seem most likely to emphasize pupil performance results in statewide minimum competency programs: (i) challenges

to the adequacy of educational programs being provided in some school districts; (ii) "educational malpractice" cases; and (iii) litigation regarding the use of pupil performance data in evaluation of teachers and other professional staff, in evaluation and classification of schools and districts, and in allocation of educational funds.

The prior discussion of state education clauses anticipated but did not deal directly with their use as a basis for challenging the quality of educational programs provided to students in some school districts. The prototypical basis for such a challenge would involve the following elements: a state education clause which contained a quality standard such as "thorough and efficient" or "high quality";[201] judicial construction of that clause to provide students with a legally actionable right and to define the state's responsibility in terms of providing all students with an educational opportunity designed to equip them actually to function as citizens and as competitors in the labor market; a statewide minimum competency testing program with a uniform performance standard designed to relate to the demands of the post-secondary school world; a high percentage of "failing" students in some districts; and evidence that those districts either had inferior "inputs"[202] or "process"[203] in relation to more successful districts, or inadequate inputs or

process in some absolute sense.[204]

The challengers should not allege such a set of facts to assert that a school district is liable merely because some of its students fail to achieve "competency". It is inconceivable that a court would accept such a concept of strict or absolute liability. Rather, the plaintiffs should argue that the failure of a substantial percentage of a district's students [205] to demonstrate competency against the statewide standard should shift to the district[206] the burden of proving the appropriateness and adequacy of its educational program.[207] If a judge were willing to adopt such an approach, and if the plaintiffs had carefully selected and presented their case, the prospects of a successful challenge should be reasonably good. Judge Carr's decision in Debra P. did not bear directly on this issue. But the opinion did suggest that the test results were reflective of deep-seated educational problems and inequalities in Florida. To that extent, Debra P. would lend some support to this type of challenge. The plaintiffs should seek as appropriate relief a court order requiring restructuring of the educational system. In the first instance, the court could require the defendants to develop and submit a plan. This approach should reduce somewhat the court's concern about interfering with the judgments of education experts. Seeking relief other than money damages should also allay some of the policy concerns

which have contributed to the lack of success in educational malpractice litigation.

The educational malpractice cases may, as a matter of fact, be another litigation area in which results of minimum competency tests are introduced by plaintiffs. The plaintiffs would claim that the implementation of a minimum competency program supports their efforts to prove the elements of a malpractice cause of action.[208] As indicated earlier in this paper, the plaintiffs would still have to confront some serious difficulties. Judge Carr's decision in Debra P. would help with one aspect, however. His opinion deals in considerable detail with the harm caused students by their failure to achieve competency (and to be publicly identified as "incompetent"). Moreover, his treatment of Florida remedial programs suggests that the state has undertaken to deal with incompetency identified by the test results and should be presumed to have the capability to do so. A major continuing problem with the malpractice litigation model is that of allocating fault to individual professionals within the school system. Plaintiffs will respond, no doubt, by increasingly trying to assert collective responsibility of the school district. Even if they succeed in that effort, they will still have to confront judicial reluctance to award money damages to individual plaintiffs when the district's educational failures may be traceable, in

substantial part, to the scarcity of resources available to it.

The final area of future litigation may differ in one significant respect from all the prior areas. Not only will it involve accepting the validity of minimum competency test results, but it may also involve supporting the particular use of those results ordained by the state. For instance, states may incorporate minimum competency testing results into the processes for evaluating teachers and other professional staff,[209] for evaluating and classifying schools or school districts,[210] and for allocating educational funds.[211] Some or all of these state-required uses may be challenged legally and the ultimate issue will be whether they are legally permissible.[212] If the state has avoided a clearly inappropriate use of the test results,[213] it should be able to prevail. Judicial deference will work in the state's favor. Moreover, the nature of the challengers' interests in these cases is of a lower order than the interests of students discussed previously. Teachers, although they certainly have the legal right to be treated fairly in their job settings, are not under legal compulsion to be there, as are most students; also, they do not have an express constitutional guarantee of a specified level of entitlement. Schools and school districts are not constitutional "persons". Their objections[214] to state evaluation or classification, consequently, will receive somewhat less sympathetic consideration by the courts.

An extension of this issue may be raised if a state has not adopted such uses of minimum competency test results. The challenges will turn upon whether the state may be legally required to do so. The plaintiffs' burden will be a very heavy one -- to demonstrate that only by incorporating student test results into its processes can the state rationally and effectively evaluate teachers and programs, or allocate funds. The likelihood that plaintiffs can prevail is slim, except if the state has acted so egregiously in failing to deal with serious educational problems that a court may feel compelled to force some response.

Conclusion

The decision in Debra P. is the first of what may become a considerable body of judicial reactions to the legality of minimum competency testing programs. Judge Carr's opinion suggests some obvious avenues for litigants to pursue. As this paper has demonstrated, other less obvious avenues cannot be ignored. Despite the continuing reluctance of the courts to intervene in detailed educational matters, legal injuries of sufficient seriousness and magnitude will cause courts to act. The ultimate message of Debra P. to educational authories, therefore, is to design and implement minimum competency testing programs with all possible professional care and skill. Their primary objectives should be to provide maximum educational benefits to all

students and to keep to an absolute minimum the harm inflicted upon students through the use of minimum competency testing programs.

Footnotes

1. For a description of statewide assessment programs, see Hawthorne, Legislation of the States: Accountability and Assessment in Education (1973).

2. Education Commission of the States, State Activity: Minimal Competency Testing (July 1, 1979). For a more detailed description of minimum competency programs, see Pipho, "Minimum Competency Testing in 1978: A Look at State Standards", 59 Phi Delta Kappan 585 (May 1978); Noonan & Rubin, Statewide Minimum Pupil Proficiency Standards: A Survey of the States (an unpublished study under NIE grant C-76-10105, July 10, 1977).

3. Typically "basic skills" includes reading comprehension, mathematical computation and, possibly, written expression. See, e.g., Cal. Educ. Code §51215 (3) (West Supp. 1979). Some states deal with competency in "life skills" as an alternative or addition to the "basic skills" approach. This may include such tasks as balancing a checkbook, or completing a tax form or employment application. It may also include knowledge of the political system and ability to function effectively. See, e.g., Mass. Dept. of Educ. Regulations for Implementation of the Basic Skills Improvement Policy, 603 C.M.R. 40.00 (Jan. 1979).

4. Usually testing begins in the 3rd or 4th grades and occurs at intervals of several years. In Florida, for example, statewide testing is required in grades 3, 5, 8 and 11, and school systems may test in additional grades and in skill areas beyond the basics. Fla. Stat. §229.57(2)(b)(1977). In most states, state education officials establish the competency standards and develop or select the test instrument. See, e.g., Fla. Stat. §229.565 (1977). In a few states, local districts are required to establish their own standards with the state providing technical assistance and monitoring. See, e.g., Cal. Educ. Code §51215 (West Supp. 1979).

5. See, e.g., Nev. Rev. Stats. 389.015; Wash. Laws of 1979, ch. 149.

6. About 15 states have attached graduation or regular diploma sanctions to minimum competency testing programs. In approximately one-third of those states the sanctions have not yet taken effect.

7. New Jersey is an exception; under current regulations beginning in school year 1980-81 school districts will be classified partly on the basis of their students' performance on the state Minimum Basic Skills test. Also, according to a recently-adopted State Board of Education regulation the evaluation of tenured teachers will include some consideration of their pupils' academic progress 10 N.J.R. 226 (July 8, 1978).

8. Debra P. v. Turlington, Civil No. 78-892-Civ.-T-C (M.D. Fla., decided July 12, 1979); Green v. Hunt, Civil No. 78-539-Civ.-5 (E.D. N. Car., decided Apr. 4, 1979); Wells v. Banks, Civil

No. CV 478-138 (S.D. Ga., filed June 17, 1978); Hernandez v. Board of Education, Lynwood Unified School District, Case No. SCC 01531 (Super. Ct. Los Angeles Co., filed May 22, 1979).

9. For more detailed discussions of many of these issues, see Clague, "Competency Testing and Potential Constitutional Challenges of 'Everystudent'", 28 Cath. U. L. Rev. 469 (1979); Lewis, "Certifying Functional Literacy: Competency Testing and Implications of Due Process and Equal Educational Opportunity", 8 J. L & Educ. 145 (1979); McClung, "Competency Testing Programs: Legal and Educational Issues, 47 Ford. L. Rev. 651 (1979).

10. Many state constitutions do have counterpart provisions. In fact, some state provisions have been applied more liberally than the federal provisions.

11. See n. 66 infra and accompanying text.

12. "Justiciability" relates to a court's capability to adjudicate a particular matter, in terms both of understanding the issues involved and devising and enforcing a suitable judgment.

13. 430 U.S. 651 (1977).

14. There are civil and criminal remedies available if a teacher inflicts excessive punishment on a student.

15. See, e.g., Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978) [court refuses to intervene in academic evaluation of medical student]; James v. Board of Education, City of New York, 42 N.Y. 2d 357, 397 N.Y.S. 2d 934, 366 N.E. 2d 1291 (Ct. of Appeals 1977) [court refuses to intervene in determining whether integrity of citywide reading tests had been compromised]; Chappell v. Commissioner of Education, 135 N.J. Super. 565, 343 A.2d 811 (App. Div. 1975) [court refuses to intervene in "fundamental educational policy" decisions to initiate pupil testing and to dissiminate results].

16. For a discussion of curricular and instructional validity, see McClung, supra n. 9, at 665-72.

17. U.S. Const. amend. XIV, §1.

18. See, e.g., N.J. Const. art. 1, §1 & art. 1, §5.

19. This may be in terms of individual items or of the general subject matter.

20. See discussion in text accompanying n. 32 infra.

21. See discussion in text accompanying n. 36 infra. See also Lewis, supra n. 9, at 172-77.

22. Minimum competency in mathematics presumably could be determined by testing in languages other than English. The argument is more difficult to mount regarding competency in communications skills, especially if the state has clearly specified that competency be in English. A possible approach is phased application of such a test to non-English speaking students. In Hernandez v. Board of Education, Lynwood Unified School District, supra n. 8, the plaintiffs indicated that they would have recommended such approaches had they been given an appropriate opportunity to participate in formulating the minimum competency program.

23. For a detailed treatment of exclusion of non-English speaking students and of various approaches to devising basic skills standards for this special population, see Bilingual Minimum Standards Committee, Research Report and Policy Recommendations (State of N.J. June 1978).

24. This argument misses a number of difficult questions including: (i) whether, given their linguistic problems it may be at least "rational" for the State to exempt them; and (ii) whether bilingual programs already may have a component designed to remedy basic skills problems.

25. See McClung, supra n. 9, at 698-701; McClung & Pullin, Competency Testing and Handicapped Students", 11 Clearinghouse Rev. 922 (1978).

26. On the other hand, total inclusion of handicapped children in minimum competency programs, could raise due process problems by setting up expectations and requirements that some handicapped children could not possibly fulfill.

27. Judicial deference to education officials' expertise would make it difficult to succeed with this argument.

28. Education for all Handicapped Children Act of 1975 (P.L. 94-142), 20 U.S.C. §§1401-1461 (1976). Implementing regulations are at 45 C.F.R. §121a. 1-.754 (1978).

29. Some states have required local districts to adopt their own minimum competency standards. See, e.g., Cal. Educ. Code §51217(a) (West Supp. 1979); Nev. Rev. Stat. §389.015(1) (1977). Others have left participation at the discretion of the local district. See, e.g., Colo. Rev. Stat. §22-7-104 (1974); Wash. Rev. Code §28 A.03.360(4) (Supp. 1978). See also discussion of Wells v. Banks, infra.

30. Under a number of "local option" statutes districts could not fail to adopt a program. See n. 29 supra.

31. Differences in the availability and quality of remedial programs, in the scope and content of the testing program, in the quality of the test instruments, in the timing of test administration also could be relevant to an equal protection challenge.

32. 426 U.S. 229 (1976).

33. Prior to Washington v. Davis, a disproportionate effect was often sufficient to establish a prima facie case of an equal protection violation. For a discussion of the development of the intent requirement, see Note, "Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy and Williamsburg", 12 Harv. C.R.C.L.L.Rev. 725 (1977).

34. 429 U.S. 252 (1977).

35. According to Lewis, supra n. 9, at 170, n. 3, at least five courts of appeals have adopted the "institutional intent" approach. For example, in U.S. v. Texas Education Agency, 564 F.2d, '68 (5th Cir. 1977), the court said that "when the official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that these acts had foreseeable discriminatory consequences." For a detailed treatment of "institutional intent", see Note, "Reading the Mind of the School Board: Segregative Intent and the DeFacto/DeJure Distinction", 86 Yale L.J. 317 (1976).

36. A more difficult case is presented when there is evidence of prior discrimination but no judicial findings have been made. Plaintiffs will have to bear a heavy burden in such a situation.

37. Green v. County School Board of New Kent County, 391 U.S. 430, 437 (1968).

38. Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1971).

39. Gaston County v. U. S., 395 U.S. 285 (1969).

40. 395 U. S. at 296-7.

41. See, e.g., Singleton v. Jackson Municipal Separate School District, 419 F. 2d 1211 (5th Cir. 1964).

42. U.S. v. Gadsden County School District, 572 F.2d 1049 (5th Cir. 1978).

43. McNeal v. Tate County School District, 508 F.2d 1017, 1020 (5th Cir. 1975).

44. Milliken v. Bradley, 433 U.S. 267, 287 (1977). Interestingly, this was a northern desegregation case involving the Detroit school district.

44a. 433 U.S. at 290. As early as 1967, the Fifth Circuit had ordered the use of remedial programs to help children overcome the effects of attending segregated, inferior schools. See, e.g., Plaquemines Parish School Board v. U.S. 415 F.2d 817, 831 (5th Cir. 1967).

45. U.S. Const. amend. XIV, §1.

46. Substantive due process requires that state action be rational and reasonably related to a legitimate state objective. Procedural due process focuses on the fairness of the procedures by which a state deprives its citizens of their liberty or property rights. Although substantive due process is surely not as important as it once was, some commentators believe that the U.S. Supreme Court has pumped new life into the concept, especially in the privacy area. For a discussion of this trend, see Clague, supra n. 9, at 494 n. 132 & 133.

47. In Paul v. Davis, 424 U.S. 693 (1976), the U.S. Supreme Court narrowed the Wisconsin v. Constantineau (400 U.S. 433 (1971)) definition of stigmatization to require the "alteration of legal status which, combined with the injury from defamation, justified the invocation of procedural safeguards." 424 U.S. at 708-09.

48. Goss v. Lopez, 419 U.S. 565 (1975).

49. McClung, supra n. 9, at 682-84. The author defines "curricular validity" as "a measure of how well test items represent the objectives of the curriculum." "Instructional validity" goes one step further by providing a measure of whether "the school district's stated objectives were translated into topics actually taught in the district's classrooms."

50. For a discusion of psychometric considerations, see McClung, supra n. 9, at 665-72. See also American Psychological Association, Standards for Educational and Psychological Tests (1974); Novick, "The Influence of Law on Professional Measurement Standards" in Educational Measurement and Law (1977).

51. Bias in the test instrument of course is highly relevant to an equal protection challenge.

52. This correlation refers to "predictive validity". Assuming that a competency test's purpose is to determine whether students will be able to function in the adult world, the best measure of the test's validity would be if those who scored well on it also performed effectively in that world. Courts have seldom required predictive validity, however, because of the difficulty and expense of obtaining the necessary data. Instead, other types of validity, such as content, construct, face and concurrent, have been considered. See discussion infra about test validity issues in Debra P.

53. This refers to "reliability", a psychometric, if not often legal, measure.

54. See, e.g., O'Connor v. Donaldson, 422 U.S. 563 (1975).

55. 393 U.S. 503 (1969).

56. See Clague, supra n. 9, at 477 n. 39.

57. 430 U.S. 651 (1977).

58. Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976). Through its extensive involvement in school desegregation cases, the Fifth Circuit has demonstrated substantial willingness to intervene in educational matters.

59. 435 U.S. 78 (1978).

60. Many state courts have shown a similar tendency. See n. 15 supra.

61. 434 U.S. 1026 (1978).

62. The Supreme Court's decision was just a summary affirmance of the district court opinion. That opinion was infused with the notion of judicial reluctance to interfere in educational matters. In fact, the district court refused to find a discriminatory purpose, which would have required intervention, despite the following: (i) state officials knew that use of the NTE would disqualify a greater number of black applicants; (ii) Educational Testing Service, creator of the NTE, urged against its use as the sole criterion in teacher selection; (iii) the NTE was supported only by content validity; and

(iv) Sourth Carolina had a long hist ory of segregation and resistance to integration orders.

63. See Clague, supra n. 9, at 477 n. 39.

64. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Tinker v. Des Moines Independent School District 393 U.S. 503 (1969); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). See generally McClung, supra n. 9, at 674-77.

65. In Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa.) 1973, the court invalidated a voluntary questionnaire that asked highly personal questions of junior high school students. But the court stressed the absence of safeguards against indiscriminate public disclosure and the use of the questionnaire to label children as potential drug abusers.

66. The education clauses use a variety of formulations. Among the more common descriptions of the required educational quality are the following: (i) "thorough and efficient" (e.g., N.J. Const. art. VIII, §4, ¶1; Ohio Const. art. VI, §2; Pa. Const. art. III, §14; W. Va. Const. art. XII, §1); (ii) "high quality" (e.g., Ill. Const. art. X, §1; Mont. Const. art.X, §1(3); Va. Const. art.VIII, §1); and (iii) "general and uniform" (e.g., Ariz. Const. art. XI, §1; Idaho Const. art. IX, §1; Ind. Const. art. VIII. §1).

67. See Tractenberg, Legal Implications of Statewide Pupil Performance Standards 18, 28 (Education Commission of the States Sept. 1977).

68. In Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), the New Jersey Supreme Court interpreted the state's "thorough and efficient" clause in that manner.

69. This is likely to be the most difficult link to establish. A minimum competency testing program undeniably is a rational way for the state to implement its educational obligation. But the state will maintain that there are other rational ways available to it.

70. This approach would raise formidable proof problems and the challenges would have to overcome a court's tendency to defer to the expertise of legislators or educators who have set the standards.

71. See n. 29 supra.

72. See n. 66 supra..

73. E.g., Title VI of the Civil Rights Act of 1964, 42, U.S.C. §2000d (1976); Equal Educational Opportunity Act of 1974, 20 U.S.C. §§1701-1758 (1976).

74. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232(g) (1976), P.L. 90-247, as added P.L. 93-3800 and amended P.L. 93-568. Implementing regulations are in 45 C.F.R. 99.1 et seq.

75. E.g., N.J.S.A. 18A:7A-2 (a)(5), (6), (7).

76. E.g., n. 28 supra.

77. E.g., Cal. Educ. Code §51215 (West Supp. 1979). See discussion of Hernandez v. Board of Education, Lynwood Unified School District, infra.

78. E.g., N.J.S.A. 18A:7A-8 [requiring state board of education to review and update statewide goals and standards at least every five years and to consult with vairous other state officials in that connection].

79. E.g., n. 5 supra.

80. There are two species of educational malpractice cases. The first -- a more novel claim -- asks "why Johnny can't read?" and involves "normal" children unable to perform at or near appropriate levels in the basic skills. For discussion of the two leading cases, see n. 81 infra. The second type of educational malpractice case closely parallels the more traditional variety of professional malpractice litigation. Typically, it involves a handicapped student whose special needs have not been properly diagnosed or treated by school or school-related professionals. In a real sense, it is traditional professional malpractice which happened to arise in a school setting. These cases have been far more successful. See, e.g., Hoffman v. Board of Education, City of New York, 64 A.D. 2d 369,410 N.Y.S. 2d 99 (App. Div. 1978).

81. E.g., Donohue v. Copiague School District, Donohue 64 A.D. 2d 29, 407 N.Y.S. 2d 874 (App. Div. 1978) aff'd 47 N.Y. 2d 440, 418 N.Y.S. 2d 375, 391 N.E. 2d 1352 (Ct. App. 1979); Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (Ct. App. 1976).

82. See Note, "Implications of Minimum Competency Legislation: A Legal Duty of Care?", 10 Pac. L.J. 947 (1979).

83. As this paper has indicated previously, inadequacies in the educational program may support constitutional or statutory claims.

84. Debra P. v. Turlington, Civil No. 78-892-Civ.-T-C (M.D. Fla., decided July 12, 1979).

85. Green v. Hunt, Civil No. 78-539-Civ.-5 (E.D. No. Car., decided Apr. 4, 1979).

86. Wells v. Banks, Civil No. CV 478-138 (S.D. Ga., filed June 17, 1978).

87. Hernandez v. Board of Education, Lynwood Unified School District, Case No. SCC 01531 (Super. Ct. Los Angeles Co., filed May 22, 1979).

88. Several prior cases dealt with issues relating to but not directly challenging minimum competency testing programs. E.g., Chappell v. Commissioner of Education, 135 N.J. Super. 565, 343 A.2d 811 (App. Div. 1975) [court refuses to bar dissemination of pupil testing results]; Robinson v. Palm Beach City School Board, No. 78-2137-C (L) 01 H (Fla. Cir. Ct., filed June 8, 1978) [limited procedural challenge to school board's failure to provide adequate notice of rule-making]; Brady v. Florida State Board of Education, No. 78-653R (Fla. Div. Adm. Hearings, decided June 15, 1978) establishment of cut-off score on statewide test is "rule-making" and hearings must be held prior to effectiveness].

89. The problem was a factual one. Green was still in the 10th grade because he had failed to complete satisfactorily enough courses to be promoted to the 11th grade.

90. It appears that racially discriminatory impact and inadequate phase-in time may have been the underlying theories.

91. This is likely to be the case even though some other challenges are and will be based on much different legal theories. See discussion of Wells v. Banks and Hernandez v. Board of Educ. of Lynwood Unified School Dist., infra.

92. Plaintiffs' Complaint para. 6.

93. Plaintiffs' Complaint para. 7.

94. Slip op. at 2.

95. Plaintiffs' Complaint at 17.

96. Plaintiffs' Complaint paras. 42-51. The first claim included two ancillary contentions that the passing scores had been arbitrarily determined and that exclusion of private school

students from the Examination requirement relieved "a disproportionately large number of white students from the risk of harm imposed on the plaintiffs." Plaintiffs' Complaint paras. 46 and 47.

97. Plaintiffs' Complaint paras. 52-57. Plaintiffs also claimed that there was an insufficient match between the instruction and curriculum offered them and the Examination.

98. Plaintiffs' Complaint paras. 58-65.

99. See Center for Law & Educ., Newsnotes 1-2 (No. 2 Sept. 1979), for a brief summary of the plaintiffs' testimony.

100. Fla. Stat. §232.246 (1)(b) (1978 Supp.).

101. Slip op. at 47.

102. In the interim, the Examination can continue to be administered by the State to assist in its remedial efforts.

103. Slip op. at 47.

104. Id.

105. Slip op. at 8.

106. Slip op. at 9.

107. Slip op. at 10-11.

108. Slip op. at 11.

109. Slip op. at 14.

110. Slip op. at 17.

111. Slip op. at 21. (Emphasis added.)

112. Slip op. at 11.

113. Slip op. at 12.

114. Id.

115. Id.

116. Id. Later in his opinion Judge Carr replied that effective remedial programs were not available until Spring 1978. Slip op. at 35.

117. Id.

118. Id.

119. Slip op. at 41.

120. Slip op. at 7. At another point, the Court says that, "Beyond the economic and academic implications of failure on the test, the stigma associated with the term functional illiteracy is the most substantial harm presented." Slip op. at 26.

121. Slip op. at 41. The Court buttressed its conclusion by referring to the economic and academic deprivations triggered by denial of a standard diploma. See slip op. at 7.

122. The Court's treatment of the plaintiffs' due process and equal protection challenges to the validity of the Examination will be dealt with in the next section of this paper.

123. Slip op. at 36.

124. Id.

125. Id.

126. Slip op. at 37.

127. Slip op. at 44.

128. Slip op. at 43.

129. Slip op. at 38-39.

130. Slip op. at 43.

131. Id.

132. See no. 32 supra and accompanying text.

133. Plaintiffs had no difficulty proving that the functional Literacy Examination had a disproportionate impact on black students and caused substantial harm. See slip op. at 5-7; 12.

134. U.S. v. Texas Education Agency, 564 F.2d 162, 167 (5th Cir. 1977), rehearing denied, 579 F.2d 910 (5th Cir. 1978), cert. denied, 47 U.S.L.W. 3838 (U.S. June 26, 1979).

135. Personnel Administrator of Massachusetts v. Feeney, 47 U.S.L.W. 4650 (U.S. June 5, 1979).

136. Id. at 4656.

137. Slip op. at 16.

138. Slip op. at 16-17.

139. Slip op. at 17.

140. Id.

141. See discussion supra.

142. The original statute used the terminology "functional literacy" and the test provided for by the statute was called the Functional Literacy Examination. Its name was subsequently changed to the State Student Assessment Test II but Judge Carr found that the "test remains the Florida functional literacy examination in the mind of the public." Slip op. at 26.

143. Slip op. at 25.

144. Id.

145. American Psychological Association, Standards for Educational and Psychological Tests 28 (1974).

146. Slip op. at 28.

147. Id.

147a. Slip op. at 29.

148. See slip op. at 29. According to Judge Carr, "the measure of a test's construct valdity is whether the hypotheses made about the defined construct will predict behavior." Id.

149. Plaintiffs had argued the test had to have construct validity and did not. Defendants had argued it need not have it but did anyway.

150. Among the flaws asserted by plaintiffs were: "the failure of [the State Department of Education] to solicit the drafting of item specifications after the writing of items; the continual use by [the State Department of Education] of definitions of functional literacy extraneous and inconsistent with the official definition; the inadequacy of the research prior to the selection of a cut-score; the questionable research methodology of the Defendants' construct validity study; the failure to follow the APA standards for the design and implementation of tests

which affect the lives of the takers in a significant fashion; the failure of [the State Department of Education] to adequately publicize what the test is and its inherent limitations; the inadequacy of the form notice sent to parents and students regarding the interpretations of scores on the test; the reliability of the test." Slip op. n. 23.

151. Slip op. at 30.

152. Slip op. n. 23.

153. Slip op. at 30.

154. Id.

155. The desegregating effects of the remedial programs will be discussed in the next section.

156. Slip cp. at 12.

157. Slip op. at 19.

158. Slip op. at 42.

159. Id.

160. Slip op. at 44.

161. Slip op. at 45.

162. Id.

163. Id. According to the Court, this is indicated by the ability of students to progress out of the programs.

164. Id.

165. Id. This is based on the ample financial support for the program and its encouraging but uncertain academic results.

166. Slip op. at 31.

167. Slip op. at 32.

168. Slip op. at 33. This conclusion was based on the court's unwillingness to apply strict scrutiny to the classification. It rejected the plaintiffs' contention that the relative poverty of blacks, resulting in the inability of many to attend private

schools, should be merged with race to form a suspect classification. Thus, the court applied the more lenient rational relationship test and concluded that the state could attack an educational problem in a sequential fashion by starting with public schools. It indicated that the legal authority of the state to extend the Examination to private school students would be influenced by the U.S. Supreme Court's upcoming consideration of Committee for Public Education & Religious Liberty v. Levitt, 461 F. Supp. 1123 (S.D.N.Y. 1978), cert. granted, 47 U.S.L.W. 3793 (U.S. June 12, 1979).

169. See "Florida Will Appeal Competency Test Delay", 61 Phi Delta Kappan 143 (Oct. 1979). The "serious concerns" include: (i) retarded improvement in educational quality threatened by four year delay; (ii) judicial intervention putting unreasonable burden on the Florida schools; (iii) an implication of the decision that diplomas should be awarded as "prizes for good attendance"; and (iv) an undue instructional emphasis on the test's objectives.

170. Id.

171. Civil No. CV 478-138 (S.D. Ga., filed June 17, 1978).

172. There is a statewide student assessment program at grades 4, 8, 10 and 11. A high school test is to be developed this year. The state board has not taken final action regarding the use of any such tests. ECS, State Activity-Minimal Competency Testing 4 (July 1, 1979).

173. Plaintiffs had proceeded through available administrative channels and had appealed an adverse decision of the state board of education to a state court. This strengthened defendants' argument that the federal court should abstain from hearing the case until final state court disposition, but the federal court apparently disagreed. The court did sever the malapportionment count and will decide it on a summary judgment motion.

174. In addition to generally weak exposition of the legal theories and supporting law, the plaintiffs' attorneys failed to assert the racial discrimination argument initially. Consequently, defendants were able to raise objections to the subsequent introduction of that issue (although the court apparently ruled in favor of plaintiffs).

175. The fact that Debra P. involved a statewide requirement and that Wells involves a local school district requirement should not

make Debra P. inapplicable. Indeed, a court should have less difficulty intervening in the latter circumstance since it will not require overriding a decision of the legislature and of the state's highest education officials.

176. Case No. SCC 01531 (Super. Ct. Los Angeles Co., filed May 22, 1979).

177. Cal. Educ. Code §51215 (1979). This statute expands upon prior statutes which provided for an early "exit" test [Cal. Educ. Code §48412 (197)] and for locally established high school graduation requirements [Cal. Educ. Code §51226 (1979)].

178. Id.

179. Plaintiffs are citizens, residents and taxpayers of the Lynwood School District, and have children enrolled in the schools. Hernandez is also Vice-President of the district's Bilingual Advisory Council and Plaintiff/Swift is president of an elementary school parent-teacher organization.

180. Plaintiffs assert, for example, that retention in grade of Spanish-speaking students based on their failure to pass an English reading test may be inappropriate and they suggest alternative approaches which they would have proposed had they been consulted in advance.

181. In Wells the argument was focused on the lack of necessary county and state board approval. In Hernandez the argument was based on the lack of sufficient parent, teacher and student involvement in the formulation of the program.

182. In their prayer for relief, plaintiffs sought a permanent injunction against: (i) use of the Functional Literacy Examination as a prerequisite to receipt of a regular diploma; (ii) use of the Examination for assigning students to remedial classes; and (iii) making any record of pupil failure on the Examination. Plaintiffs' Complaint at 18.

183. See discussion in the preceding section, supra.

184. If this argument were to succeed, it might lead a court to defer effectiveness of a minimum competency testing program rather than to invalidate it. That would depend upon whether the state had made substantial progress toward such validity. If it had, but too late to provide adequate due process notice, deferral would be the more likely relief ordered.

185. See, e.g., Serrano v. Priest, 96 Cal. Rptr. 601, 487 P. 2d 1241 (1971).

186. The most dramatic instance would be one in which some districts have no competency requirement. See discussion of Wells v. Banks, supra.

187. See n. 66 supra.

188. If litigation challenges to such programs are coordinated in some fashion, an incremental or sequential approach is likely to be taken. The diploma sanction, as the most visible and vulnerable element, may be the initial focus. Assuming ultimate success in invalidating it, subsequent challenges may be directed successively at other elements.

189. The latter alternative is especially plausible if a high percentage of a school's or district's students "fail" the test. This may suggest that the general educational program has to be reconsidered.

190. The Kentucky Supreme Court has just ruled that the state cannot force sectarian private schools to meet accreditation standards regarding courses, teachers and textbooks comparable to those applicable to public schools. However, the court left open the possibility that the state could monitor the private schools' performance through a standardized achievement testing program. N.Y. Times, Oct. 10, 1979, at A16, col. 2.

191. See, e.g., Armstrong v. Kline, Civil Nos. 78-172, 78-132, 78-133 (E.D. Pa., June 21, 1979) [federal district court ruled that "appropriate education" standard of P.L. 94-142 required state to provide more than traditional 180 day school year for students who needed longer academic year]; In re Skipworth, 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958) [state court refused to apply compulsory education law to student who was not receiving effective education].

192. For descriptions of the state of school finance litigation, see, e.g., Lawyers' Committee for Civil Rights Under Law, Update on Statewide School Finance Cases (Feb. 1979); Levin, "Current Trends in School Finance Reform Litigation: A Commentary", 1977 Duke L.J. 1099.

193. See, e.g., Education Commission of the States, School Finance Reform in the States: 1978 (June 1978).

194. In Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), the New Jersey Supreme Court referred to the situation as a "profound violation" of the state constitution.

195. It is not necessary that the adjudication of educational deficiencies be a prior one. Plaintiffs could premise a minimum competency challenge on evidence of present defects in the quality of education afforded and request the court to adjudicate the matter. The Debra P. plaintiffs did precisely that in regard to several elements of their complaint.

196. For discussion of this possibility, see, e.g., Tractenberg & Eisdorfer, "The Role of the Courts and Teacher Certification", in ERIC Clearinghouse on Teacher Education, Legal Issues in Teacher Preparation and Certification 109-50 (June 1977). See also discussion infra.

197. The kinds of defects which might justify such a conclusion are numerous. In fact, they need not be statewide in origin but could relate to substantial educational deficiences in a particular school district. In such a case, the students presumably would not object strenuously to use of the test as a diagnostic and remedial tool but would object to the application of sanctions to them.

198. See nn. 66-69 supra and accompanying text.

199. New Jersey is a good example. The State Commissioner of Education was strongly on record as opposing such a program, even though the existing legislation seemed to require it. A diverse coalition successfully lobbied in the state legislature for a bill which eliminated any doubt about the requirement. The program has since been implemented. Initially, this was without any student sanctions but a bill subsequently passed both houses of the legislature to impose a diploma sanction.

200. See nn. 185-87 supra and accompanying text.

201. See n. 66 supra.

202. In the educational literature, "inputs" generally refer to the quantity and quality of tangible resources used by a school system (e.g., dollar expenditures, physical plant, professional and support staff, supplies and materials).

203. "Process" generally refers to the educational environment through which, it is hoped, students will learn. It includes the curriculum, the organizational structure, and the interrelationships among the various participants in the school system.

204. This frame of reference would compare the inputs and process to the educational needs of the particular district and its students. It is conceivable, for example, that a district has

resources which appear to be adequate in relationship to other districts but which are inadequate because of the special needs of its pupil population.

205. In some New Jersey districts as many as 85 percent of the students have fallen below the statewide standards at some grade levels. Among the urban districts, failure rates well in excess of 50 percent are the rule.

206. State education authorities are likely to be named as defendants, too. In fact, the real controversy in some cases may be between local and state authorities in terms of which is to blame for concededly inadequate programs.

207. Of course, the defendants might attempt to meet the challenge by arguing that the test results were not valid, at least for this purpose. This suggests an additional strategy for the plaintiffs. They might then contend that the minimum competency testing program should be invalidated.

208. See nn. 82 & 83 supra and accompanying text.

209. Several states have already done so, at least in a limited way. In New Jersey, for example, a state regulation provides that "a summary of available indicators of pupil progress and growth, and a statement of how these indicators relate to the effectiveness of the overall program and the performance of the individual teaching staff member will be a component of the evaluation process for tenured teachers." 10 N.J.R. 226 (July 8, 1978).

210. New Jersey also has regulations under which school districts will be classified partly on the basis of their students' performance on the State Minimum Basic Skills test. Changes proposed in those regulations have been the subject of heated controversy in the education community.

211. Several states, including Florida and New Jersey, require that remedial programs be provided to students who "fail" the minimum competency test. See also n. 5 supra. Typically, state funds are allocated to cover at least a portion of the costs of such programs. Some years ago, the state of Michigan had a substantial, and very controversial, experience with "test-based" funding.

212. In New Jersey Education Association v. New Jersey State Board of Education, Civil No. 78-1881 (D.N.J., filed Aug. 7, 1978), the teachers' association has challenged, among other things, the use

of pupil "progress" in evaluating tenured teachers. But compare McCrum v. Board of Education of the City of New York, 396 N.Y.S. 2d 691 (App. Div. 2d Dept. 1977) and Dathe v. Wildrose School District, 217 N.W. 2d 781 (N.Dak. 1974), where dismissed teachers introduced their students' improved scores on standardized tests to prove their competence, and Scheelhaase v. Woodbury Central Community School District, 439 F. Supp. 988 (D. Iowa 1972), rev'd, 488 F.2d 237 (8th Cir. 1973), cert. denied, 417 U.S. 969 (1974), where the federal courts sustained the dismissal of a teacher on the basis of her pupils' poor test performance.

213. For example, if the state required dismissal of any teacher whose students failed to perform at a certain competency level without consideration of any other factors, that approach could be invalidated on due process arbitrariness grounds.

214. Of course, the objections may be raised by students or residents of the district, especially about the stigma and other injury to them of having their district classified as "unapproved". Their claims would probably be given more weight than those of the district.